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In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES JACKSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Statute involved	2
Question presented	2
Statement	2
Argument:	
Introduction and summary	4
I. The provision of the Kidnaping Act imposing capital punishment if the jury so recommends does not burden the assertion of the right to trial by jury in violation of the Sixth Amendment	6
II. If, contrary to our argument, the provision of the Kidnaping Act relating to capital punishment is void, the proper remedy is invalidation of that provision, not of the entire Act	13
Conclusion	15

CITATIONS

Cases:

Andres v. *United States*, 333 U.S. 740	7, 12
Booth v. *United States*, 251 F.2d 296	10
Brown v. *United States*, 204 F.2d 298, certiorari denied, 346 U.S. 925	10
Bullock v. *Harpole*, 233 Miss. 486, 102 So.2d 687	5
Cortez v. *United States*, 387 F.2d 699, certiorari denied, 381 U.S. 953	10
Champlin Ref. Co. v. *Commission*, 286 U.S. 210	14
Delaney v. *United States*, 199 F.2d 107	10
Donnelly v. *United States*, 185 F.2d 559, certiorari denied, 340 U.S. 949	12
Gooch v. *United States*, 82 F.2d 534, certiorari denied, 298 U.S. 658	11
Green v. *United States*, 40 App. D.C. 426	11

Cases—Continued

	Page
Griffin v. *United States*, 380 U.S. 609	4, 5, 7, 10
Harney v. *United States*, 306 F.2d 523, certiorari denied, *sub nom. O'Connell* v. *United States*, 371 U.S. 911	10
Harrell v. *United States*, 371 F.2d 160, certiorari denied, 387 U.S. 923	10
Kent v. *United States*, 272 F.2d 795	10
Laboy v. *New Jersey*, 266 F.Supp. 581	10
Martin v. *United States*, 256 F.2d 345, certiorari denied, 358 U.S. 921	10
People of Virgin Islands v. *Price*, 181 F.2d 394	12
Robinson v. *United States*, 264 F.Supp. 146	12
Rosenberg v. *United States*, 346 U.S. 273	7, 8
Seadlund v. *United States*, 97 F.2d 742	4, 11
Singer v. *United States*, 380 U.S. 24	11
State v. *Belton*, 48 N.J. 432	11
State v. *Best*, 44 Wyo. 383	11
Tabor v. *United States*, 203 F.2d 948, certiorari denied, 345 U.S. 1001	10
United States v. *Dalhover*, 96 F.2d 355, certiorari denied, 305 U.S. 632	11
United States v. *Dennis*, 183 F.2d 201, affirmed, 341 U.S. 494	10
United States v. *Donovan*, 242 F.2d 61	12
United States v. *Harriss*, 347 U.S. 612	14
United States v. *Willis*, 75 F. Supp. 628	10, 11
Winston v. *United States*, 172 U.S. 303	12

Statutes and rule:

1932 Kidnaping Act, 47 Stat. 326	8
18 U.S.C. 1201(a) (Kidnaping Act)	2, 3, 4, 6, 9, 12
18 U.S.C. 2113(e) (Bank Robbery Act)	4, 8, 12
18 U.S.C. 2312	3
42 U.S.C. 2272, 2274-2276 (Atomic espionage)	4
Rule 23(a), Federal Rules of Criminal Procedure	11
D.C. Code § 22-2801	5
New Hampshire Revised Statutes § 585:4	5
New Hampshire Revised Statutes § 585:5	11
New Jersey Statutes § 2A:113-3	5

Statute and rule—Continued — Page

New Jersey Statutes § 2A:113-4 5
Nevada Revised Statutes (1957), §§ 200, 360 5
Wyoming Statutes (1957), § 6-59 5

Congressional material:

75 Cong. 13283-13284, 13286-13297, 13299, 13303-13304 9
75 Cong. 13284-13285, 13289 8
78 Cong. Rec. 5738, 8127-8128 9
92 Cong. Rec. 9482, 10194 8
H.Rep. No. 1457, 73d Cong., 2d Sess. 9
H.Rep. No. 1461, 73d Cong., 2d Sess. 9
H.Rep. No. 1493, 72d Cong., 1st Sess. 8
H.Rep. No. 2478, 79th Cong., 2d Sess. 8
H.Conf.Rep. No. 2670, 79th Cong., 2d Sess. 8
Kidnapping: Hearing Before the House Committee on the Judiciary, 72d Cong., 1st Sess., on H.R. 5657 8
S. 2252, 73d Cong. 2d Sess. 9
S. 2841, 73d Cong., 2d Sess. 9
S. 1717, 79th Cong., 2d Sess. 8
S.Rep. No. 765, 72d Cong., 1st Sess. (S. 1525) 8
S.Rep. No. 1211, 79th Cong., 2d Sess. 8

Constitution of the United States:

Fifth Amendment 7
Sixth Amendment 2, 4, 10
Eighth Amendment 3

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OPINION BELOW

The opinion and order of the district court (R. 15-19) are reported at 262 F.Supp. 716.

JURISDICTION

The order of the district court dismissing count one of the indictment on the ground of the unconstitutionality of the statute upon which the indictment was founded was entered on January 9, 1967 (R. 18-19). Notice of appeal to this Court was filed on February 6, 1967, and probable jurisdiction was noted on

May 29, 1967 (387 U.S. 929; R. 25). We invoke the jurisdiction of this Court under 18 U.S.C. 3731.

STATUTE INVOLVED

18 U.S.C. 1201(a) provides:

> Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

QUESTION PRESENTED

Whether the Federal Kidnaping Act, 18 U.S.C. 1201(a), is void under the Sixth Amendment because it provides for the death penalty (in cases where the victim has been killed or otherwise harmed) "if the verdict of the jury shall so recommend."

STATEMENT

Respondents were indicted on October 10, 1966. Count one charged that they had transported in interstate commerce from Milford, Connecticut, to Alpine, New Jersey, in violation of 18 U.S.C. 1201(a), one John Joseph Grant III, an individual whom they had kidnaped to help them escape arrest, and that the

victim was harmed when liberated (R. 1).[1] By bills of particulars, the government specified that the victim had suffered lacerations of the wrist, hands and arms (R. 3; see, also, R. 14).

Respondents Jackson and Walsh filed motions to dismiss the indictment, contending that the Kidnaping Act is void for vagueness because it uses the words "ransom or reward or otherwise" (R. 4-6).[2] In his memorandum in support of his motion, respondent Jackson urged two other grounds for dismissal, one of which was that, because the statute authorizes the death penalty "if the verdict of the jury shall so recommend," he was put "to an unconstitutional choice, rendering it impossible for him to enter a voluntary plea of guilty or to plead not guilty without paying a heavy price" (R. 7-8).[3]

The district court accepted this argument. It interpreted the statute to provide that "the death penalty may be imposed *only* if the jury so recommends" but that "a recommendation by the jury makes the death penalty *mandatory*" (R. 17; emphasis the

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[1] A second count charged the transportation in interstate commerce of a stolen motor vehicle, in violation of 18 U.S.C. 2312. It is still outstanding.

[2] Respondent De La Motte did not file a written motion to dismiss, but at the hearing on his co-defendants' motions generally adopted their arguments (R. 16).

[3] His other ground was that the statutory authorization of capital punishment, in light of the conduct for which that penalty can be assessed, permits punishment so grossly disproportionate to the gravity of the offense as to constitute "cruel and unusual punishment" in violation of the Eighth Amendment (R. 8-10).

court's). While remarking *Seadlund* v. *United States*, 97 F. 2d 742, 748 (C.A. 7)—which holds that a trial court has authority, after accepting a guilty plea, to submit the question of punishment to a jury—the court nevertheless stated that such authority "is discretionary, its exercise uncertain" (R. 18); that "the price for assertion" of the right to trial by jury is, therefore, "the risk of death" (R. 18); and that this risk "is at least substantially reduced" if the defendant pleads guilty or waives jury trial (R. 17). Invoking this Court's decision in *Griffin* v. *California*, 380 U.S. 609, 614, for the proposition that a statute or procedure cannot stand which makes "costly" the assertion of a constitutional right, it concluded that the Kidnaping Act "impairs defendants' free exercise of their right to trial by jury" and thus "violates the Sixth Amendment to the Constitution of the United States and is invalid" (R. 18).

ARGUMENT

Introduction and Summary

The district court held in this case that the Kidnaping Act is void under the Sixth Amendment because it provides for capital punishment "if the verdict of the jury shall so recommend"—thus discouraging defendants, in the court's view, from asserting their constitutional right to trial by jury. This novel ruling (which would invalidate a number of other criminal laws)[4] rests, in our view, upon unsound rea-

[4] Similar provisions are contained in 18 U.S.C. 2113(e) (bank robbery); 42 U.S.C. 2272, 2274-2276 (atomic espion-

soning. Government may not penalize a criminal defendant for asserting his constitutional rights—as by making his refusal to take the stand in his defense a matter of comment by the judge or the prosecutor. *Griffin* v. *California*, 380 U.S. 609. But it does not follow, as the court below implied, that all procedures for mitigating the severity of criminal punishment are invalid because they may occasionally provide some inducement to a defendant to forego a procedural right.

At all events, in the view we take of this case, this Court need not decide that broad question. We think the court below erred in its conclusion that a kidnaping defendant who elects a jury trial thereby materially increases the likelihood that capital punishment will be imposed. Even if he waived trial by jury or pleaded guilty, it would not follow that he would escape that penalty. The trial court could—and, in an appropriate case, experience shows, would—empanel a jury to determine punishment, regardless of the defendant's decision to concede his guilt or have it determined by the court. In addition, we read the statute as authorizing the court to decline the jury's recommendation of capital punishment and impose a lesser penalty. As we explain, the short of the matter is that the provision requiring the jury to

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age); D.C. Code, § 22-2801 (rape); and in a number of State criminal statutes. Nev. Rev. Stat., § 200. 360; N.H. Rev. Stat. § 585:4; Wyo. Stat., § 6-59. Cf. N.J. Stat., §§ 2A:113-3, 2A:113-4; *Bullock* v. *Harpole*, 233 Miss. 486, 494, 102 So. 2d 687, 690.

authorize the death penalty is designed to minimize, not to increase, the occasions of its imposition.

If we are wrong, and this provision of the Kidnaping Act is unconstitutional, it by no means follows, as the court below thought, that the statute is void and no punishment can be imposed upon a convicted kidnaper. Clearly, the provision for capital punishment should be viewed as severable from the remaining provisions of the statute, Congress' paramount purpose in enacting the statute having been, not the imposition of the death penalty, but the punishment of kidnaping as a federal crime.

I. The Provision of the Kidnaping Act Imposing Capital Punishment If the Jury so Recommends Does Not Burden the Assertion of the Right to Trial by Jury in Violation of the Sixth Amendment

In holding the Kidnaping Act unconstitutional because it requires a jury recommendation as the prerequisite for imposition of the death penalty, the district court announced a principle having far-reaching and disquieting implications. The principle is that any procedure for mitigating the severity of criminal punishment is invalid if, to invoke the procedure, the defendant might be induced to forego a constitutional right. Were this proposition sound, a judge would be precluded from ever entertaining a guilty plea to a lesser offense than that charged, lest the defendant argue that he was induced to forego his right to trial by jury by fear of incurring a heavier punishment. Such a result would be unfortunate. It would rob the criminal process of much of its flexibility, and

would almost certainly lead to generally heavier penalties. We cannot agree that it is compelled by *Griffin* v. *California*, 380 U.S. 609—the only authority relied on by the district court for its proposition.

The question in that case was whether a judge's or prosecutor's comment to the jury that the refusal of the accused to take the stand and testify in his defense evidenced his guilt improperly curtailed the exercise of his Fifth Amendment right to remain silent. This Court held that it did. The only purpose of commenting on the accused's silence was to turn the assertion of his constitutional right to the advantage of the prosecution. No one suggests that the practice of permitting criminal defendants to plead guilty to lesser offenses, or of requiring the jury's authorization before the death penalty may be imposed, were devised to enable the prosecution to thwart the assertion of constitutional rights. Both practices, rather, operate to mitigate the severity of punishment.

The requirement that imposition of capital punishment be authorized by a jury "reflects the movement * * * against the death sentence"; it "seeks to retain capital punishment as a policy but does not make its imposition after a finding of guilty imperative." *Andres* v. *United States*, 333 U.S. 740, 753-754 (Frankfurter, J., concurring.) Thus, it has been said with respect to the jury-authorization requirement—similar to that at bar—of the Atomic Energy Act that its purpose "was to ameliorate the penalties imposed for disclosing atomic secrets" (*Rosenberg* v. *United States*, 346 U.S. 273, 317 (Appendix to Opinion of

Douglas, J., dissenting)). Such legislation, "which deprives the District Court of unconditional power to impose the death sentence," is "the less harsh statute" than "one which grants such unconditional power." *Id.* at 299 (Black, J., dissenting).[5]

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[5] The sentencing procedure of the Atomic Energy Act was clearly adopted as a compromise between those who favored capital punishment and those who opposed it. The original bill (S. 1717), as it passed the Senate and was introduced to the House by the Committee on Military Affairs, provided a maximum penalty for atomic espionage of twenty years' imprisonment and a $20,000 fine. S. Rep. No. 1211, 79th Cong., 2d Sess., pp. 23, 30; H. Rep. No. 2478, 79th Cong., 2d Sess., p. 12. The bill was amended on the House floor to increase the maximum penalty to death. 92 Cong. Rec. 9482. The Senate and House conferees agreed that "the penalty of death or imprisonment for life may be imposed, but only upon the recommendation of the jury * * *" (H. Conf. Rep. No. 2670, 79th Cong., 2d Sess., p. 9); Representative Thomason, the House manager of the bill, explained that "the committee thought just as a matter of justice and also in trying to be practical * * * that the death penalty should only be imposed by a jury" (92 Cong. Rec. 10194).

The sentencing procedures of the Kidnaping Act and of subsection (e) of the bank robbery statute appear to reflect a similar compromise. When first enacted in 1932 the Kidnaping Act contained no capital penalty. 47 Stat. 326. A provision empowering the court to impose the death penalty had been contained in the original Senate bill (S. 1525), but had been struck in committee. S. Rep. No. 765, 72d Cong., 1st Sess. A similar provision had been contained in the original House bill (H.R. 5657) (see Kidnaping: Hearing Before the House Committee on the Judiciary, 72d Cong., 1st Sess., on H.R. 5657, p. 1), but had been amended in committee to authorize the jury to recommend mercy (H. Rep. No. 1493, 72d Cong., 1st Sess.). Debate produced a three-way division. Some members, for a variety of reasons, opposed capital punishment (75 Cong. Rec. 13284-13285, 13289-13290, 13294, 13297, 13304); others favored it (*id.*, 13283, 13284, 13286-13295); and some preferred the traditional practice of leaving sen-

It is arguable, to be sure, that in some instances ameliorative provisions may have the incidental effect of inducing defendants not to contest in full measure. The answer, we submit, is that the trial judge must be alert to the possible danger; he must refuse to accept a plea or waiver that is not the product of unfettered choice. Adequate safeguards thus exist; it is not, in our view, necessary to adopt an absolute prohibition of all procedures that may contain some potential of inducement to forego a constitutional right—a Procrustean result that would most often work to the harm of the accused. Certainly, the

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tencing discretion to the court (*id.*, 13288, 13296). Those who expressed support for the committee amendment interpreted it as authorizing imposition of the death penalty only if the jury so determined (*id.*, 13294-13295), and they favored that procedure because it took the onus of inflicting death from the judge in cases "of such atrocity, or such heinousness" that capital punishment was warranted (*id.*, 13297).

In the face of the Senate's adamant opposition to the death penalty (*id.*, 13299, 13303, 13304), the House accepted the Senate bill without capital punishment. But then in 1934 the Senate passed a bank robbery bill (S. 2841) which authorized the death penalty, at the discretion of the court, for killing or kidnaping in connection with such robberies (78 Cong. Rec. 5738). The House amended the provision to its present form (H. Rep. No. 1461, 73d Cong., 2d Sess.), and added a similar provision as an amendment to a Senate bill (S. 2252) making other changes in the Kidnaping Act (H. Rep. No. 1457, 73d Cong., 2d Sess.; 78 Cong. Rec. 8127-8128).

From this history, it would appear that the capital provisions of both Acts (like the similar provision of the Atomic Energy Act) were enacted in the form they were as a compromise designed to limit the death sentence to egregious cases "of such atrocity, or such heinousness" that a jury would authorize its imposition.

Griffin decision compels no such conclusion. The lower courts have uniformly rejected the extreme view adopted by the district court in this case.[6]

We pretermit further discussion of this broad question to observe that the element of inducement in the present context is, in any event, far too attenuated to constitute a significant burden upon assertion of the right to a jury trial. The defendant in a kidnaping case does not, by attempting to plead guilty or waive trial by jury, avert the possibility of capital punishment; and, conversely, by electing trial by jury, he does not materially enhance the risk that he

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[6] *Martin* v. *United States*, 256 F. 2d 345, 347-349 (C.A. 5), certiorari denied, 358 U.S. 921; *Laboy* v. *New Jersey*, 266 F. Supp. 581 (D. N.J.); *United States* v. *Willis*, 75 F. Supp. 628 (D. D.C.). Compare the cases holding that a plea of guilty is not coerced merely because it is induced by an agreement to limit punishment by dismissing counts, not bringing charges, or making recommendations to the court. *Cortez* v. *United States*, 337 F. 2d 699 (C.A. 9), certiorari denied, 381 U.S. 953; *Kent* v. *United States*, 272 F. 2d 795 (C.A. 1); *Harrell* v. *United States*, 371 F. 2d 160, 162 (C.A. 7), certiorari denied, 387 U.S. 923; *Martin* v. *United States*, *supra*, 256 F. 2d at 348-349; *Booth* v. *United States*, 251 F. 2d 296, 297 (C.A. 9); *Brown* v. *United States*, 204 F. 2d 298, 300-301 (C.A. 5), certiorari denied, 346 U.S. 925; *Tabor* v. *United States*, 203 F. 2d 948 (C.A. 4), certiorari denied, 345 U.S. 1001. Compare, also, the general principle that a defendant who establishes prejudicial publicity warranting a change of venue cannot escape prosecution by complaining that to assert his right to an impartial jury he was forced to waive another Sixth Amendment right: that to a speedy trial, or to trial in the vicinage. See *United States* v. *Dennis*, 183 F. 2d 201, 226 (C.A. 2), affirmed, 341 U.S. 494; *Delaney* v. *United States*, 199 F. 2d 107, 112 (C.A. 1); *Harney* v. *United States*, 306 F. 2d 523, 532, n. 4 (C.A. 1), certiorari denied *sub nom.* *O'Connell* v. *United States*, 371 U.S. 911.

will be so punished. The trial judge is not required to approve a waiver of jury trial or accept a plea of guilty.[7] And even if he does approve waiver of jury trial with respect to the issue of guilt or innocence, or accepts a plea of guilty, he remains free to convene a jury for purposes of recommending appropriate punishment.[8]

The district court did not dispute the existence of the power, but disparaged it as discretionary and uncertain. We point out, however, that in the majority of the cases under the Kidnaping and Bank Robbery Acts in which capital punishment has been imposed, the trial judge refused to permit the defendant to avoid a jury recommendation on punishment by pleading guilty or waiving trial by jury.[9] Perhaps, a jury

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[7] *Singer* v. *United States*, 380 U.S. 24; *Gooch* v. *United States*, 82 F. 2d 534, 535 (C.A. 10), certiorari denied, 298 U.S. 658; *Green* v. *United States*, 40 App. D.C. 426 (C.A. D.C.); *United States* v. *Willis*, 75 F. Supp. 628 (D.D.C.); Rule 23(a), Federal Rules of Criminal Procedure.

[8] *Seadlund* v. *United States*, 97 F. 2d 742, 748 (C.A. 7). See, also, *United States* v. *Dalhover*, 96 F. 2d 355 (C.A. 7), certiorari denied, 305 U.S. 632. The practice in States having similar provisions (n. 4, *supra*, pp. 4-5) is generally the same. *E.g.*, *State* v. *Best*, 44 Wyo. 383, 389-390, 12 P. 2d 1110, 1111; *State* v. *Belton*, 48 N.J. 432, 439, 226 A. 2d 425, 429; N.H. Rev. Stat., § 585:5.

[9] According to the records of the Federal Bureau of Prisons, ten defendants have been (or are awaiting) execution under these provisions. Case reports and Department of Justice records disclose that five pleaded guilty; yet, the question of their punishment was still submitted to the jury. In two other cases, moreover, the plea was refused by the court, either directly or in effect.

To place the issue of this case in perspective, we further

might recommend capital punishment in a case where the judge would have accepted a guilty plea—but the jury's determination is not, in our view, binding on the court. It has been held that the concurrence of the trial judge in the jury's recommendation is required,[10] and this reading conforms to the long tradition that makes the trial judge in the federal courts the arbiter of the sentence; to the mitigative purpose of the provision requiring jury authorization of the death penalty; and to the decisional trend which has sought—at times in the face of statutory language apparently to the contrary—to place the most humane construction on capital legislation.[11]

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note that, according to the Administrative Office of the United States Courts, 563 individuals were convicted under the Kidnaping Act between 1951 and 1966. Of these, 389 pleaded guilty or no contest, 28 were convicted in a trial to the court, and 146 by juries. Four were sentenced to death—three after pleading guilty. Under the Bank Robbery Act, 4482 were convicted in this period, 3690 after pleading guilty or no contest, 86 after trial to the court, 706 after trial by jury. Two were sentenced to death, both after pleading not guilty. (Administrative Office statistics do not, however, differentiate between those who were convicted under the capital and under the non-capital provisions of the statute.) Between 1952 and 1966, according to these same sources, 144 individuals were convicted of rape in the District of Columbia. None was executed. Fifty-four pleaded guilty or no contest, 5 were convicted by the court and 85 by juries.

[10] *Robinson* v. *United States*, 264 F. Supp. 146, 151-153 (W.D. Ky.); cf. *People of Virgin Islands* v. *Price*, 181 F. 2d 394, 396 (C.A. 3).

[11] See, *e.g.*, *Winston* v. *United States*, 172 U.S. 303; *Andres* v. *United States*, 333 U.S. 740; *Donnelly* v. *United States*, 185 F.2d 559 (C.A. 10), certiorari denied, 340 U.S. 949; cf. *United States* v. *Donovan*, 242 F.2d 61, 64 (C.A. 2).

In sum, whether a defendant in a kidnaping case demands a trial by jury, on the one hand, or decides to waive trial by jury or plead guilty, on the other, there is a similar risk of capital punishment. Either way, the concurrence of both court and jury is necessary for its imposition. If the defendant elects to be tried by a jury, the death penalty will be imposed only if the jury so recommends and the judge agrees. If the defendant chooses not to have a jury trial, the judge must first determine whether he would concur in a jury recommendation of capital punishment; if he decides he would, he will convene a jury for punishment and if the jury recommends capital punishment will presumably concur. We see no essential difference in these procedures.

II. If, Contrary to Our Argument, the Provision of the Kidnaping Act Relating to Capital Punishment Is Void, the Proper Remedy Is Invalidation of That Provision, Not of the Entire Act

All circumstances considered, we urge rejection of the view that the provision in suit so deters exercise of the right to jury trial that it must be struck down, despite its humane and alleviative purpose. But, if we are wrong in our submission, we urge the Court to save the Act as a whole, invalidating only the offensive provision. The provision authorizing the death penalty was not part of the original Act, but was added several years later by amendment (n. 5, *supra*, pp. 8-9). If it is invalid, that should not taint the remaining provisions. As this Court said

in *Champlin Rfg. Co.* v. *Commission*, 286 U.S. 210, 234:

> * * * The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

See, also, *United States* v. *Harriss*, 347 U.S. 612, 627. There is no basis for doubting that Congress resolutely intended to make the interstate transportation of kidnaped persons a federal crime; the infirmity, if any, in the capital penalty clause does not require the total frustration of that purpose. In no event, therefore, should the charge have been dismissed.

CONCLUSION

The judgment of the district court should be reversed, and the case remanded with directions to reinstate count one of the indictment.

Respectfully submitted.

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